

The International Legal Status of Informal International Law-making Bodies: Consequences for Accountability

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A. Introduction

Informal international law-making (IN-LAW) is a broad phenomenon that is taking place in various forms and by different kinds of bodies. According to Pauwelyn, the informal character of this international law-making process may be reflected at three levels: process informality (cross-border cooperation between public authorities, with or without the participation of private actors and/or international organisations (IOs), in a forum other than a traditional international organization), actor informality (between actors other than traditional diplomatic actors (such as regulators or agencies) and output informality (does not result in a formal treaty or traditional source of international law).²

In this chapter, we take a closer look at two kinds of IN-LAW bodies that have become prevalent in the past two decades: what we refer to in this paper as international agencies and harmonization networks. International agencies are international bodies that are based on a decision by an IO. Harmonisation networks are international networks of national public regulatory authorities that are in the business of harmonizing their rules or setting standards or other norms.

While these and other informal bodies have received significant attention in the political science and IR scholarship, the purpose of this paper is to contribute to our understanding of the these bodies, as well as IN-LAW bodies more generally, from a public international law perspective. We first seek to define their status under public international law according to traditional and progressive approaches. The international legal status of the bodies is important to be able to define the applicability of (general) international law.³ The problem of accountability being the main concern of the IN-LAW project, we then seek to understand the consequence of their status for the question of accountability.

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² See introductory chapter by Pauwelyn.

³ As is the legal status of the normative output. See J. D'Aspremont [...].

As we shall see, despite the process or actor informality of these bodies, many have formal operations, as is reflected in the existence of detailed procedural rules, permanent staff, or a physical headquarter. Nevertheless, on the one hand, under most traditional accounts, they cannot be classified as IOs or as possessing international legal personality. On the other hand, liberal interpretation of traditional definitions and/or progressive approaches may lead to different conclusions.

Be that as it may, seen from an accountability perspective, this debate is largely theoretical and of little practical use. In the current state of international law, whether a body has international legal personality or not is of little meaning to accountability. Accountability, as referred to in Pauwelyn's introductory chapter, focuses on procedural aspects such as oversight mechanisms, transparency and participation.⁴ In the absence of any procedural international law on accountability (that is, setting out rules on good administrative practice such as transparency, participation of stakeholders, reason giving, complaints, and remedial mechanisms), subjects of international law are not formally bound by any accountability rules.

A different concern is whether IN-LAW bodies escape substantive international law, say human rights law. On this topic we need to keep in mind that IN-LAW bodies are composed (at least partly) of governmental actors. These actors, even if they are not diplomats, may be bound by international law on the basis of the rules on international responsibility. We can think of it as a situation that is similar to a situation of partnership in domestic law where, in the absence of legal personality, each partner is responsible for the activities of the partnership. Hence, even in the absence of legal personality, IN-LAW bodies do not entirely escape substantive international law.

All the same, there are advantages of having legal personality: IN-LAW bodies could be directly subject to substantive international law (albeit partly), and as such, claims regarding breaches of international law could be made directly towards them. The consequence of this approach would be that private actors collaborating in IN-LAW bodies would also not escape international law. As the normative effects of IN-LAW bodies become more important, and their power increases, such an approach would indeed appear to be justified. At the same time, we must not forget that in the absence of complaints mechanisms in international law, it is unclear how any international responsibility could be enforced. Moreover, such an independent status has possible drawbacks, such as diminishing the power of domestic accountability mechanisms that are currently in place. There is, hence, need to further contemplate the consequences, and the advantages and disadvantages of granting (at least some) IN-LAW bodies with legal personality.

The Chapter is organized as follows. We first describe the emergence of new bodies in global governance and their role in making informal international law (section B). We then describe the main characteristics of harmonisation networks (Section C) and international agencies (Section D). In Section E we examine the international legal status of harmonisation networks and international agencies, We distinguish between the traditional approach (1) and contemporary approaches (2), including whether IN-LAW bodies should have international

⁴ See introductory chapter by Pauwelyn.

legal personality (2c). We then consider the importance of international legal personality for the question of accountability (Section F). Section G is used to draw some tentative conclusions.

B. The emergence of new global bodies and the making of informal international law

One of the challenges to the discipline of public international law in the past two to three decades has been the rise of bodies at the global level that play a role in international or transnational normative processes but cannot be captured by the traditional definition of subjects of international law. That is, they are not States and do not fall within the traditional definition of an IO and/or lack international legal personality (ILP) in the traditional sense. What makes things even more complicated for the discipline of international law is that some of these bodies generate norms, such as best practices, guidelines, and so forth that affect a wide range of countries, companies and people, without these being considered sources of international law. Irrespective of the legal status of the norms that are the product of these non-traditional bodies, there is some agreement on the idea that ‘*lawmaking*’ is no longer the exclusive preserve of states’.⁵

Being beyond the traditional, formal delimitations of international law, the IN-LAW project has coined the term informal international law making to describe this phenomenon. It is defined as

cross-border cooperation between public authorities, with or without the participation of private actors and/or international organizations, in a forum other than a traditional international organization (process informality), and/or as between actors other than traditional diplomatic actors (such as regulators or agencies) (actor informality) and/or which does not result in a formal treaty or traditional source of international law (output informality).⁶

In an attempt to essentially capture the same phenomenon, other international legal scholars have described it as ‘post-national rule-making’⁷ or as the ‘exercise of international public authority’⁸. The latter submits that ‘any kind of governance activity by international institutions, be it administrative or intergovernmental, should be considered as an exercise of international public authority *if* it determines individuals, private associations, enterprises, states, or other public institutions.’ The IN-LAW project covers only those bodies in which public actors are involved; hence, the key questions underlying the project (related to

⁵ A. Boyle and C. Chinkin, *The Making of International Law* (Oxford University Press, Oxford 2007) vii (emphasis added). R.A. Wessel, ‘Informal International Lawmaking as a New Form of World Legislation?’ (2011) 8 *International Organizations Law Review*. See for a non-legal approach: M.J. Warning, *Transnational Public Governance: Networks, Law and Legitimacy* (Palgrave Macmillan 2009).

⁶ See introductory chapter by Pauwelyn.

⁷ University of Amsterdam Project on ‘The Architecture of Post-national Rule-making : Views from Public International Law, European Law and European Private Law’.

⁸ Von Bogdandy, P. Dann and M. Goldmann, ‘*Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*’ in Von Bogdandy et al (eds.), *The Exercise of Public Authority by International Institutions* (Springer, Heidelberg 2009) 5.

accountability) become relevant in particular when such international public authority is exercised.

Apart from being outside the traditional structures of international law, IN-LAW also tends to be characterized by several other factors:

First, IN-LAW tends to be characterized by so-called multi-level regulation. Multi-level regulation, similar to the notion of multi-level governance as developed in political science and public administration, describes from a legal perspective the interactions between global, regional, and national regulatory spheres.⁹ In most States, decisions made at the international or transnational level require implementation in the domestic legal order before they become valid legal norms, and the density of the global governance web has caused some interplay between the normative processes at various levels. In other cases, rules are adopted by IOs, such as the WTO, which allow them to indirectly affect national legal orders.¹⁰

These interactions between national and international legal spheres, including the regional legal sphere for regional organisations, have intensified and gained increased visibility over the past few years. It is becoming ever more difficult to draw dividing lines between legal orders. It should be noted that most research on multi-level regulation has focused on the EU, but the phenomenon is also taking place in other regions, such as the ASEAN region.

The multi-level regulation school of thought demonstrates that international law is increasingly coming to play a role in national and regional legal orders, whereas national and regional legal developments are exerting a bottom-up influence on the evolution of the international legal order.¹¹ This has led some observers to argue that the

Central pillars of the international legal order are seen from a classical perspective as increasingly challenged: the distinction between domestic and international law becomes more precarious, soft forms of rule-making are ever more widespread, the sovereign equality of states is gradually undermined, and the basis of legitimacy of international law is increasingly in doubt.¹²

Second, while the IN-LAW project draws attention to the fact that an increasing number of public and private actors are part of the global normative web, obviously States and IOs continue to play their role in global rule-making. Hence, what we see is the creation of a web of States, IOs, NGOs, transnational actors, and regulatory authorities that are all playing an important role in global governance. Collaboration is also increasingly beyond the public-private divide: in some issue areas, there is intense cooperation between State and non-State

⁹ A. Føllesdal, R.A. Wessel and J. Wouters (Eds.), *Multilevel Regulation and the EU: The Interplay between Global, European and National Normative Processes* (Martinus Nijhoff Publishers, Leiden, Boston 2008).

¹⁰ S. Shapiro, 'International Trade Agreements, Regulatory Protection and Public Accountability' (2002) 54 *Admin. Law Review* 435.

¹¹ On the phenomenon of what can be cautiously referred to as a new Europeanisation of international law, see J. Wouters, A. Nollkaemper, E. de Wet (eds.) *The Europeanisation of International Law: The Status of International Law in the EU and Member States* (T.M.C. Asser Press, The Hague 2008).

¹² N. Krisch & B. Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 *EJIL* 1.

actors. In some areas, States even have even ceased to play a role in governance and transnational actors have taken over.

Recently, Koppell sketched - both empirically and conceptually - the organisation of global rule-making. Even in the absence of a centralized global State, the population of what he refers to as GGOs is not a completely atomized collection of entities. 'They interact, formally and informally on a regular basis. In recent years, their programs are more tied together, creating linkages that begin to weave a web of transnational rules and regulations.'¹³ This resulted in a network of multiple GGOs consisting of a variety of governmental, non-governmental and hybrid organisations, which have as their main objective the crafting of rules and standards for worldwide application.¹⁴

Third, the informality of so many of these global bodies has raised many accountability and legitimacy concerns, and it is this concern that is at the basis of the IN-LAW project. In a nutshell, the concern is that States, companies and individuals are confronted by rules that are adopted in settings that exercise a *de facto* decision-making power beyond the reach of the accountability measures of domestic or international law.¹⁵ And several cases in the present book have indeed related informality to a lack of accountability and effectiveness.¹⁶

IN-LAW, as defined above, includes a large number of bodies. From within the plethora of bodies active at the global level, in the following sections we will take a closer look at two kinds of informal international law-making bodies: harmonisation networks and international agencies. Although both types of bodies differ substantially, we feel that they both represent trends that make the implications of IN-LAW quite visible.

C. Harmonisation networks

1. Introduction

Harmonisation networks as understood in this paper are networks of public regulatory authorities (at times in collaboration with private partners) that are in the business of harmonising their domestic rules, setting standards or other norms. Anne-Marie Slaughter is the scholar to have made the most notable contribution to our understanding of networks of public regulatory authorities, or what she refers to as 'trans-governmental regulatory networks'. She defines them as 'pattern[s] of regular and purposive relations among like government units working across the borders that divide countries from one another and that demarcate the "domestic" from the "international" sphere'.¹⁷ They allow domestic officials to interact with their foreign counterparts directly, without much supervision by foreign offices or senior

¹³ J.G.S. Koppell, *World Rule. Accountability, Legitimacy, and the Design of Global Governance* (University of Chicago Press, Chicago/London 2010).

¹⁴ See for a recent survey of examples O. Dilling, M. Herberg and G. Winter (eds.), *Transnational Administrative Rule-Making: Performance, Legal Effects and Legitimacy* (Hart Publishing, Oxford 2011).

¹⁵ See introductory chapter by Pauwelyn.

¹⁶ See for instance the contribution by Svetiev on the ICN

¹⁷ Anne-Marie Slaughter, *A New World Order* (Princeton University Press, Princeton 2004) 14.

executives, and feature loosely-structured, peer-to-peer ties developed through frequent interaction.¹⁸ The networks are composed of national government officials, either appointed by elected officials or directly elected, and they may be among judges, legislators, or regulators.¹⁹

While Slaughter's work focused on networks composed purely of public regulatory authorities, in reality, regulators often collaborate with private bodies, too, in particular in harmonisation networks. For example, the US, EU, and Japanese drug regulatory authorities collaborate with the medical devices industry associations in the Global Harmonization Task Force (GHTF), or US and EU aviation authorities collaborate with aviation industry organizations on the US-EU Aviation Harmonization Work Program.

While in some cases, trans-governmental regulatory networks are nothing more than talking shops, that is, they provide a forum for the exchange of information and experience, harmonization networks actually engage in standard-setting, harmonization, or setting of norms. Harmonization networks should be of particular interest to the IN-LAW project since they serve as excellent examples of informal international law-making by actually issuing norms. Examples include the Basel Committee on Banking Supervision (Basel Committee), the International Organization of Securities Commissions (IOSCO), the International Conference on Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH), or the Financial Stability Board (FSB).

Harmonisation networks are not only a global phenomenon, but quite popular in regional settings, too. The most concentrated site for such networks is the EU.²⁰ Another area of dense networking is in the transatlantic relationship between the US and the EU.²¹ But networks are present in other regions as well, including the pharmaceutical Harmonization Networks in Southeast Asia (ASEAN PPWG), the Gulf region (GCC-DR), South America (PANDRH), and others. Similarly, the Asian Harmonization Working Party works toward the harmonisation of medical devices regulation in Asia.²²

¹⁸ Anne-Marie Slaughter and David Zaring, 'Networking Goes International: An Update' (2006) 2 *Annual Review of Law and Social Science* 215; K. Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002) 43 *Virginia Journal of International Law* 1; T. Risse-Kappen, 'Introduction' in T. Risse-Kappen (ed.) *Transnational Relations Back In* (Cambridge University Press, New York 1995).

¹⁹ Slaughter, *A New World Order*, 3-4.

²⁰ Slaughter, *A New World Order*, 43.

²¹ *ibid.* 44. On networks in the context of transatlantic governance, see M. A. Pollack and G. C. Shaffer (eds.), *Transatlantic Governance in the Global Economy* (Rowman&Littlefield, Lanham, MD 2001); George A. Bermann, 'Regulatory Cooperation between the European Commission and U.S. Administrative Agencies' (1996) 9 *Administrative Law Journal of the American University* 933; David Vogel, *Benefits or Barriers?: Regulation in Transatlantic Trade* (The Brookings Institution, Washington D.C. 1997). George Bermann, M. Herdegen, and P. Lindseth (eds.) *Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects* (Oxford University Press, Oxford/New York 2001).

²² See <http://www.ahwp.info/> accessed 26 Oct. 2011.

2. Characteristics of harmonisation networks

a. Membership

Harmonisation networks are composed of public regulatory authorities. For example, the International Cooperation on Cosmetics Regulation (ICCR) is comprised of cosmetic regulatory authorities from the US, EU, Japan, and Canada.²³ The Financial Stability Board brings together national authorities responsible for financial stability.²⁴ Often, the relevant private sector - in particular the respective industry association - will be a member, too. For example, drug industry associations from the US, EU, and Japan are ICH members.²⁵

The membership spectrum is broad. Whereas some harmonisation networks tend to emulate the format of a club with a limited number of participants, others tend to be more inclusive. For example, on one side of the spectrum we find the GHTF, which consists of drug regulatory authorities and industry associations from the US, Europe, Japan, Canada, and Australia.²⁶ Similarly, the ICH has members from the US, EU and Japan. On the other side of the spectrum, IOSCO brings together over 100 securities regulators.²⁷ Even more extensive is the International Competition Network (ICN), which brings together regulators from all five continents.²⁸ The FATF also accepts a relatively broad membership.²⁹

Due to increased interest by outsiders, some of the club-like harmonisation networks have slowly been opening up and allowing greater participation, in particular by emerging countries, in their work. For example, the ICH, has in recent years set up a Global Cooperation Group and a Regulators Forum in order to cooperate with other regional harmonisation networks and drug regulatory authorities, respectively. The Basel Committee, originally founded by the G-10 industrial economies, and comprised of central bankers, has also expanded and now includes significant emerging economies such as China and Brazil.³⁰ Moreover, in many of these organisations, observer status or different levels of membership with different rights attached are common. That is the case, for example, in the FATF, or the International Cooperation on Harmonization of Technical Requirements for Registration of Veterinary Medicinal Products (VICH).³¹

b. The legal basis for their cooperation

Under traditional international law, regulatory authorities - as sub-units of the State - lack independent international legal personality (we discuss this further below). Unless authorized by the State, they will, as a rule, not conclude treaties on behalf of the State.

²³Section 1 of 'Terms of Reference for ICCR', available at <http://www.fda.gov/InternationalPrograms/HarmonizationInitiatives/ucm114522.htm> accessed 25 Oct. 2011.

²⁴ See <http://www.financialstabilityboard.org/about/overview.htm>, and <http://www.financialstabilityboard.org/members/links.htm> accessed 25 Oct. 2011.

²⁵ www.ich.org accessed 25 Oct. 2011.

²⁶ www.ghtf.org accessed 25 Oct. 2011.

²⁷ <http://www.iosco.org/> accessed 25 Oct. 2011.

²⁸ www.internationalcompetitionnetwork.org accessed 25 Oct. 2011.

²⁹ www.fatf-gafi.org accessed 25 Oct. 2011.

³⁰ <http://www.bis.org/bcbs/> accessed 25 Oct. 2011.

³¹ www.vichsec.org accessed 25 Oct. 2011.

Consequently, trans-governmental regulatory cooperation is often conducted on the basis of non-binding agreements, such as MOUs.³² These are signed by regulators as non-binding statements of their intent to cooperate. Often, cooperation takes place in the form of informal initiatives without any sort of MOU between the regulators involved. For example, in the case of the ICH and GHTF, the basis for their cooperation is a Terms of Reference issued by the parties. These documents, while informal, often have a constitutional nature.³³

c. The organizational framework in which harmonization networks operate

Harmonisation networks operate in different contexts. Some operate within the framework of an IO, whereas others operate independently of any traditional framework.

The Blood Regulators Network is an example of a harmonisation network within an IO. It is comprised of regulatory authorities that have responsibility for the regulation of blood products, and whose activities take place under the auspices of the WHO.³⁴ These types of networks come close to the international agencies discussed below.

The second kind of harmonisation networks - those that operate outside of IOs - are of particular interest to the IN-LAW project as they do not correspond to the traditional definitions of IOs, but are nevertheless institutionalised. Examples include the Basel Committee, IOSCO, the ICN, the ICH, and the VICH.

d. Internal structure and governance

Trans-governmental regulatory networks may operate at different levels of institutionalisation. While some may be extremely unstructured, some have become more institutionalised.³⁵ The latter is in particular the case in harmonization networks such as Basel, IOSCO and the ICH that are highly institutionalised, and could rightfully be considered trans-governmental regulatory organizations (TROs).³⁶ They have many of the characteristics commonly associated with an organisation. The ICH, for instance, is composed of a permanent steering committee and working groups, has a secretariat and organizes public conferences. It has documents comparable to constitutions which set out the governance and the structure of the

³² Anne-Marie Slaughter, 'Governing the Global Economy through Government Networks' in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press, Oxford 2000) 189; Sol Picciotto, 'Constitutionalizing Multilevel Governance?' (2008) 6 *International Journal of Constitutional Law* 1,6; Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' 22.

³³ See for example, the GHTF Roles and Responsibilities Document (setting out the roles and responsibilities of the members and organs, the operational structure etc.), the GHTF Guiding Principles Document (setting out goals and objectives, as well as governing principles), and the GHTF Operating Procedures document (setting out the decisions making process), www.ghtf.org. Similarly, VICH has an 'Organizational Charter of VICH' (setting out the organization's objectives and principles, its operational structure, the roles and responsibilities of members and organs, the decision making procedure etc.), www.vichsec.org. The ICH has a 'Terms of Reference' document, www.ich.org.

³⁴ <http://www.who.int/bloodproducts/brn/en/> accessed 25 Oct. 2011.

³⁵ See on this point also Slaughter and Zaring, 'Networking Goes International: An Update' 215.

³⁶ Zaring refers to the Basel Committee and IOSCO as 'international financial regulatory organizations'. See David Zaring, 'International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations' (1998) 33 *Texas International Law Journal* 281.

organisation as well as the harmonised guideline development procedure.³⁷ Furthermore, it has online presence with a website of its own, it conducts consultations and so forth.

Having said that, the level of institutionalisation of harmonisation networks is still relatively light in comparison to traditional IOs: their secretariats tend to be rotating amongst members (such as in GHTF), or they are too small and thus rely on a secretariat of an IO or an industry association. For example, the Basel Committee's secretariat services are provided by the Bank of International Settlements (BIS), and the ICH's secretariat is located with the International Federation of Pharmaceutical Manufacturers and Associations (IFPMA). They have few employees, if any, and other than regular meeting schedules, they have no permanent presence. They feature either a small budget or no budget at all, with each member usually covering their own costs.

Finally, many harmonisation networks have developed administrative features that are traditionally marked as features of democratically governed domestic systems of administrative law.³⁸ For example, the governance structure, operation and guideline development procedure of the ICH, VICH, GHTF, and ICCR are set out in constitution-like documents. The guideline-development procedures include elements similar to notices and comments as well as instructions regarding transparency and consultations with stakeholders. Their websites make many of their meeting minutes, framework documents, and so forth available to the public. The Basel Committee has similar administrative features, too.

e. The output

The documents issued by harmonisation networks are typically considered not legally binding. Nevertheless, members are expected to implement the guidelines in their domestic legal system. In the GHTF, for example, 'founding Members will take appropriate steps to implement GHTF guidance and policies within the boundaries of their legal and institutional constraints.'³⁹ Similarly, the Basel Committee members have agreed to implement the accords within their own domestic system. And indeed, in practice the guidelines enjoy widespread compliance and considerable normative force, which puts their non-legally binding character into perspective.

The normative effect of the guidelines extends beyond the member regions. In practice, the guidelines are often adopted by non-members. For example, more than 100 States have implemented the Basel Accords to a greater or lesser degree.⁴⁰ Similarly, ICH guidelines, setting out rules for approval of new medicines, have been adopted globally by many non-members.⁴¹

³⁷ The 'Formal ICH Procedure' sets out the decision making process.

³⁸ See on this topic also Slaughter and Zaring, 'Networking Goes International: An Update' 215; David Zaring, 'Informal Procedure, Hard and Soft, in International Administration' (2005) 5 *Chicago Journal of International Law* 571-572, 594.

³⁹ Article 2.1, 'GHTF Roles and Responsibilities Document', available at http://www.ghtf.org/documents/sc/sc_n2r10.pdf accessed 26 Oct. 2011.

⁴⁰ Mario Savino, 'An Unaccountable Transgovernmental Branch: The Basel Committee' in S. Cassese et al. (eds.), *Global Administrative Law: Cases, Materials, Issues* (Institute for International Law and Justice: NYU School of Law, and Istituto di Ricerche sulla Pubblica Amministrazione 2008) 67.

⁴¹ Ayelet Berman, *The Role of Domestic Administrative Law in the Accountability of IN-LAW*.

D. International agencies

1. Introduction

Apart from harmonisation networks, a relatively new development is the proliferation of what this chapter refers to as international agencies⁴². That is, international bodies that are neither based on a treaty nor on a bottom-up cooperation between national regulators, but on a decision by an IO. According to some observers, these international agencies even outnumber conventional organisations.⁴³ We consider that the specific characteristics of international agencies, that is, their position between IOs and member States justifies a separate analysis.

It is not unusual for International Agencies to ‘exercise public authority’ (as defined above). Here also, the tendency towards functional specialisation because of the technical expertise required in many areas may be a reason for the proliferation of such bodies and for their interaction with other IOs and agencies, which sometimes leads to the creation of common bodies.

International (regulatory) cooperation is often conducted between these non-conventional international bodies.⁴⁴ Whereas traditional IOs are established by an agreement between States, in which their control over the organisation and the division of powers is laid out,⁴⁴ the link between newly created international bodies and the States that established the parent organisation is less clear. As one observer holds, this ‘demonstrates how the entity’s will does not simply express the sum of the member states’ positions, but reformulates them at a higher level of complexity, assigning decision-making power to different subjects, especially to the international institutions that promoted the establishment of the new organization.’⁴⁵

It is not entirely uncommon for IOs to establish bodies with public law functions. Since these bodies are usually not based on a treaty, they would traditionally not qualify as IOs themselves.⁴⁶ A first possibility is that these bodies are set up by one IO only, to help attain the objectives of that organisation. The most well-known examples include the bodies established by the UN General Assembly (such as UNCTAD, UNEP, UNIDO, UNCHS, UNFPA and UNDP). These bodies are usually referred to as subsidiary organs⁴⁷, or as quasi-autonomous

⁴² See C. Shanks et al., ‘Inertia and Change in the Constellation of International Governmental Organizations, 1981-1992’ (1996) 50 *Int’l Org.* 593.

⁴³ *Ibid.*, at 501.

⁴⁴ On the different dimensions of the relationship between states and international organizations D. Sarooshi, ‘The Legal Framework Governing United Nations Subsidiary Organs’ (1997) 67 *British Yearbook of International Law* 413.

⁴⁵ C. Martini, ‘States’ Control over New International Organization’ (2006) 6 *Global Jurist Advances*, Issue 3, Article 4 <http://www.bepress.com/gj/advances/vol6/iss3/art4>.

⁴⁶ In the law of IOs the view is still held that they should be based on an international agreement. Cf. H.J. Schermers and N.M. Blokker, *International Institutional Law: Unity within Diversity* (Martinus Nijhoff Publishers, Leiden 2003); J. Klabbbers, *An Introduction to International Institutional Law* (Cambridge University Press, Cambridge 2009).

⁴⁷ See D. Sarooshi, ‘The Legal Framework Governing United Nations Subsidiary Organs’; S. Torres Bernardez, ‘Subsidiary Organs’ in R.J. Dupuy (ed.), *Manuel sur les Organisations Internationales – A Handbook on International Organizations* (Martinus Nijhoff Publishers, Dordrecht 1998) 109.

bodies (QABs)⁴⁸. Special bodies were also set up by the UN Specialised Agencies and other UN-related organisations.⁴⁹ A case in point is the Al Qaeda and Taliban Sanctions Committee, a subsidiary organ of the UN Security Council, with its competence to place an individual on the consolidated list of terrorist suspects.⁵⁰ In many cases this type of international agency has the characteristics of an IO in its own right and is therefore less relevant for our analysis of IN-LAW.

A second group of bodies is created by two or more IOs in areas where the problems they face transcend their individual competences. While these bodies may be established on the basis of a treaty concluded between IOs (as was the case with the International Center for the Improvement of Maize and Wheat (CIMMYT), created in 1988 by the World Bank and the UNDP; or the Vienna Institute, created in 1992 by the BIS, EBRD, IBDR, IFM, OECD and – later – the WTO), more frequently they are the result of decisions taken by the respective organisations. It is not even exceptional for the above-mentioned subsidiary organs to, in turn, act as a parent organisation for the newly created bodies (thus leading to what could be termed third-level international bodies). Thus, in 1994, UNICEF, UNDP, UNFPA, UNESCO, the WHO and the World Bank instituted UNAIDS (the Joint United Nations Programme on HIV/AIDS) and earlier examples include the World Food Programme (WFP; created by the FAO and the WHO in 1961), the Codex Alimentarius Commission (a 1962 FAO and WHO initiative), the International Trade Centre (WTO and UNCTAD in 1968), the Intergovernmental Panel on Climate Change (WMO and UNEP in 1998), the Joint Group of Experts in the Scientific Aspects of Marine Environmental Protection (GESAMP, created by the IMO, FAO, UNESCO and WMO in 1969), and the Global Environmental Facility (GEF, created by the World Bank in 1991 and joined by UNDP and UNEP).⁵¹ An example is also formed by the World Heritage Convention (WHC), whose parties are the UNESCO member States that have ratified the convention itself, while States, intergovernmental, or non-governmental organisations that are not UNESCO members may accede to the WHC, either as participants or as advisors.

2. *Characteristics of International Agencies*

Irrespective of our use of the term international agencies for public law bodies established by IOs, there seems to be a great deal of differentiation among the institutional designs and practices of various agencies. The question is whether it is possible to identify some

⁴⁸ P. Szasz, 'The Complexification of the United Nations System' (1999) 3 *Max Planck Yearbook of United Nations Law* 1.

⁴⁹ Examples include the Commission on Phytosanitary Measures (created by the FAO in 1997) and the Prototype Carbon Fund (instituted by the World Bank in 1997). See Martini, *op.cit.*, at 4-5.

⁵⁰ See on this nature of the Committee: C. Feinäugle, 'The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?' (2008) 9 *German Law Journal* 1513.

⁵¹ See Martini, *op.cit.*, for a more extensive analysis. Most examples used in this section are drawn from her survey. See on the interesting example of the GEF also L. Boisson de Chazournes, 'The Global Environment Facility Galaxy: On Linkages among Institutions' (1999) 3 *Max Planck Yearbook of United Nations Law* 243; and E. Hey, 'Exercising Delegated Public Power' in R. Wolfrum and V. Röben (Eds.), *Developments of International Law in Treaty Making* (Springer, Berlin 2006) 437.

core legal features that are common to international agencies. Does the label simply refer to second generation international bodies, established by one or more IOs? Or it is possible to distinguish a more articulated regulatory structure, based on a number of shared legal features?

The aim of the present section is to identify the nature of these bodies by attempting to define them on the basis of possible common characteristics.⁵²

a. Membership

The membership of most International Agencies is usually strictly linked to the membership of the establishing organizations. Thus, membership is normally open to all member states and other members of the 'parent organization'. At the same time, non-governmental organizations and IOs that are not members of the establishing institutions may usually join the International Agency as observers, in accordance with the relevant provisions of the parent organization.

b. Internal structure

Though not always (but quite often) provided with legal personality, international agencies usually share a structure centred around four pillars, reflecting the mainstream of the establishing IOs: a main collegiate body composed of representatives of all members; an executive committee made up of representatives of a limited number of members; several subsidiary bodies responsible for specific tasks and usually composed of representatives of a limited number of members; and an administrative secretariat made up of officials serving the international agency.

c. Relations with member States

Member states participate in international agencies in two main regards. To begin with, the internal offices of international agencies are composed of member States' representatives; the main exception being the administrative secretariat, which is composed of international officials serving the international agency. All other offices have a plenary or selective transnational composition. This results in interesting dynamics: on the one hand, member States influence and condition the international agencies' decision-making procedures; on the other hand, they are in turn influenced and conditioned by the institutional contexts in which they express their voice. The agency's institutional context is capable of putting the will of single member States into perspective and the offices may represent an instrument for the international agency to penetrate the domestic orders, communicating with national administrations, and directing them towards specific goals and objectives.

Member States participate not only in the internal structure, but also in the administrative proceedings taking place within international agencies themselves. As a matter of fact, international regulation lays down a number of administrative proceedings that require the intervention not only of the relevant international agency, but also of national and composite

⁵² This section is largely based on E. Chiti and R.A. Wessel, 'The Emergence of International Agencies in the Global Administrative Space: Autonomous Actors or State Servants?' in N. White and R. Collins (Eds.), *International Organizations and the Idea of Autonomy* (Routledge, 2011). That contribution also offers a number of examples of International Agencies. Credit is due to Edoardo Chiti.

administrations. Administrative proceedings involving international agencies do not usually result from the introduction of new, international layers of procedure on top of pre-existing national procedures. Yet, they are composite administrative proceedings and may involve and integrate a number of international, national, and mixed authorities. Such composite administrative proceedings allow for a different form of participation of member States in the activities of international agencies. Whereas the voice of member States is usually expressed in collegiate bodies in which several strategies may be developed, composite administrative proceedings stabilize the cooperation between a number of national, international, and mixed competent authorities.

d. Relations with other international institutions

The relationship between international agencies and other global and regional institutions may differ from the one between the parent organization and other institutions. In this case, the relevant global regulatory system participates in the international agency in the same way member States do. Most commonly, however, global regulatory systems do not become members of an international agency, but acquire an observer status or establish other forms of cooperation that are not necessarily formalized in an agreement. In both cases, the parent organizations exercises a strict control over the relations between the established agency and other international organisations.

e. Involvement of private parties

International agencies are public law bodies established by IOs and, presumably, subject to public law institutes and rules. Although some authors point to the hybrid private-public regime of some important International Agencies, such as CAC, usually the interaction of private parties does not lead to any kind of hybrid nature of the international agency.⁵³ In most cases certain private parties are conferred some procedural guarantees in the administrative proceedings taking place before international agencies, to provide the latter further information and expertise. In a more limited number of cases, private parties have a formal representation within the internal structure of the relevant international agency, in particular in a collegiate body provided with advisory power.

f. Powers and administrative law mechanisms

Finally, international agencies tend to converge as far as their powers are concerned. Again, we see a mixed picture. The powers granted to international agencies are often constructed either as simple coordination of member States' activities or as non-binding regulatory powers. And yet, such powers tend in practice to go well beyond mere coordination and gain a genuinely binding regulatory character.

⁵³ See on this point B. Kingsbury, N. Krisch and R.B. Stewart, 'The Emergence of Global Administrative Law' 15, 22. For a different view, see A. Herwig, 'Transnational Governance Regimes for Foods Derived from Bio-Technology and their Legitimacy' in C. Joerges, I. Sand and G Teubner (eds), *Transnational Governance and Constitutionalism* (Hart, Oxford 2004)199 ff. At the same time it should be acknowledged that there are other relevant bodies, which have been said to perform public law functions, but have a strong non-governmental origin, such as the World Anti-Doping Agency (WADA) or the Internet Corporation for Assigned Names and Numbers (ICANN). See on these bodies recently L. Casini, 'Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (Wada)' (2009) 6 *International Organizations Law Review* 421, and D. Lindsay, *International Domain Name Law. ICANN and the UDRP* (Hart, Oxford 2007),

This substantial evolution of the powers of international agencies is usually accompanied by the development of administrative law mechanisms. Such mechanisms vary considerably from case to case. Yet, in all cases they respond to the exigency of strengthening control over the functioning and operations of international agencies through the provision of a number of administrative principles and rules applying to decision-making. Their sources include treaties and general principles of public international law. More often, however, administrative law mechanisms are established by non-treaty law-making of the parent organisations as well as of international agencies *per se*, including soft law measures.

As for their content, the emerging administrative law principles and rules tend to converge around decisional transparency, procedural participation and reasoned decisions, while review by a court or other independent tribunal is normally excluded. In particular, international agencies develop a practice of transparency by releasing, generally on their websites, administrative decisions, information on which they are based and material on internal decision-making. Moreover, participation in decision-making proceedings has been promoted. Notably, procedural guarantees are designed as rights of States and are granted to all member States, not only to those directly affected by regulatory decisions. Procedural guarantees are extended to civil society and private actors, although their effective role in the decision-making process is contested and their formal rights are often more limited than those granted to States.

g. *The autonomy of international agencies*

IOs usually do much more with their authority than their creators intended and are even forced to do so. And, indeed, States have created IOs also in cases where they themselves lack the necessary expertise. And it is exactly their expertise that may form a source of the (exercise of public) authority of international agencies.⁵⁴ While IOs must be autonomous actors to be able to fulfil their delegated tasks⁵⁵, the assumption could be that their autonomy will only be strengthened if they use their mandate to set up international bodies that were not (explicitly) part of the original delegation.

In relation to international agencies, Martini argued that the loss of States' influence – and hence the autonomous position of international agencies – is reflected in at least three phenomena⁵⁶: (1) the fact that the new entities emerge from the regular decisions of other organisations, rather than through the treaty-making process, compromises States' ability to influence not only their creation but also their further development; (2) States may lose some powers to the parent organisations, such as the power to appoint the new entity's executive heads; moreover, they might have to share the power to define and manage the organisation's activities; and (3) in the non-state-created organisations the international secretariat plays a greater role.

⁵⁴ M. Barnett and M. Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press, Ithaca, London 2004) 24. A similar line of reasoning may be found in I. Venzke, 'International Bureaucracies from a Political Science Perspective – Agency, Authority and International Institutional Law' (2008) 9 *German Law Journal* 1401.

⁵⁵ *Ibid.*, at 22.

⁵⁶ Martini, *op.cit.*, at 24.

Many of the established bodies may exercise functions exclusively and independently from their parent organisation(s). After all, the very reason to establish an agency is that the organisation wishes to outsource certain technical or operational tasks.⁵⁷ Decision-making in these areas should then not be subject to (political) control by States. The autonomy of the agency is thus related to its relative independent position (as a bureaucracy) from the parent organisation, and thus, from the member States of that organisation.

In practice, however, the picture is, at best, mixed. Research reveals that International Agencies continue to be dependent on member States, in so far as their internal architecture has an intergovernmental or multinational nature, and they operate through administrative proceedings to which national authorities are called to participate in. In functional terms, irrespective of their bureaucratic character, many international agencies can even be seen as mechanisms of administrative cooperation and integration among domestic authorities.⁵⁸ On the other hand, certain forms of autonomy towards member States are emerging, in particular in cases where scientific expertise plays a large role. Ironically, it may very well be their pivotal position in the global regulatory network – with tentacles that reach within domestic legal orders as well as towards global and regional institutions – that allows them to be key actors in IN-LAW.

E. The international legal status of harmonisation networks and international agencies

1. The traditional approach under international law

In this section we examine the traditional definitions in public international law of international legal personality and intergovernmental organization, and how harmonisation networks (or more generally, Trans-governmental Regulatory Networks) and International legal Agencies fit in, if at all.

While there is no formal definition of an IO under international law, there is a common understanding (based on practice, scholars, etc.) regarding the main criteria that need to be fulfilled. These criteria are (1) some form of international agreement, (2) between states, (3) autonomy or will of its own, and (4) international legal personality.⁵⁹

To have legal personality, a body needs to be ‘capable of possessing rights and duties under international law’.⁶⁰

⁵⁷ See on technical bodies also W. Edeson, ‘The Role of Technical Bodies’ in R. Wolfrum and V. Röben, *op.cit.*, pp. 63-92.

⁵⁸ See Chiti and Wessel, *op.cit.*

⁵⁹ See for instance, H. G. Schermers and N.M. Blokker, *International Institutional Law: Unity within Diversity* (Martinus Nijhoff Publishers, Boston/Leiden 2004) 26. See for an extensive assessment of the notion of legal personality: R.A. Wessel, ‘The International Legal Status of the European Union’, *European Foreign Affairs Review*, 1997, no. 1, pp. 109-129 and R.A. Wessel, ‘Revisiting the International Legal Status of the EU’, *European Foreign Affairs Review*, 2000, pp. 507-537.

⁶⁰ *Reparation for Injuries case*, I.C.J. Reports (1949). p.179; Christian Walter, ‘Subjects of International Law’, in R. Wolfrum (ed) *The Max Planck Encyclopaedia of Public International Law* (Oxford

a. *Harmonisation networks*

Trans-governmental Regulatory Networks in general, and harmonization networks as a particular case, do not constitute IOs and lack international legal personality under the traditional definitions in public international law.

As we have seen, first, harmonization networks are usually not based on an international agreement, but rather on agreements that are not intended to be legally binding (such as a MOUs, gentlemen's agreements or no written agreement at all) by regulators. Second, while some of the documents have constitutional characteristics, they are not concluded by unitary States, as Schermers and Blokker have pointed out: 'agreements between branches of different governments or between particular public authorities do not normally create international organizations.'⁶¹

Third, the existence of autonomy or a separate will is a defining element for an IO to have legal personality⁶², and this is used to distinguish IOs from other forms of institutionalized cooperation amongst States.⁶³ Most often, the decision-making organs of harmonisation networks reach their decisions on the basis of consensus. As such, they express the consolidated will of the State parties, rather than an independent and distinct will of the network. The secretariat, too, will usually not have independent powers. Moreover, autonomy is often understood as meaning the capacity to conduct external relations. Indeed, harmonization networks may have extensive external relations with other networks, IOs, NGOs, or the private sector. For example, the GHTF has strong relations with the Asian Harmonization Working Party, and it also cooperates with ISO and the International Electro-technical Commission (IEC). The ICH cooperates with non-member drug regulatory authorities and has even established a 'Global Cooperation Group' in charge of these relationships. The VICH has a very close relationship with the World Animal Health Organization (OIE). However, all of these relations are informal in the sense that they are not based on legally-binding agreements. These are, therefore, not external relations in the traditional sense.

Finally, harmonisation networks cannot be equated with the creation of a new international legal person, which would enjoy an independent status under public international law.⁶⁴ Since traditionally sovereignty is possessed by the State as a whole, and not by its component parts, the organs of the State are not capable of possessing rights and duties at the

University Press 2008) http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1476&recno=4&author=WalterChristian accessed 26 Oct. 2011.

⁶¹ H.G. Schermers and Niels M. Blokker, *International Institutional Law: Unity Within Diversity*, 4th edition (M. Nijhoff, The Hague and Boston 2003) 29.

⁶² Nigel D. White, *The Law of International Organisations*, 2nd edition (Melland Schill Studies in International Law, Manchester University Press 2005) 1.

⁶³ Kirsten Schmalenbach, 'International Organizations or Institutions, General Aspects' in R. Wolfrum (ed.) *The Max Planck Encyclopaedia of Public International Law* (Oxford University Press 2008) A.2.(b), http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e499&recno=2&author=SchmalenbachKirsten accessed 26 Oct. 2011.

⁶⁴ See Wessel, *International Legal Status*.

international level. As a result, harmonisation networks, being composed of regulatory authorities, are not considered as capable of possessing international legal personality.⁶⁵

b. International agencies

The situation may be somewhat ambiguous with regard to international agencies. Established by IOs, these agencies may have been granted a separate status under international law and may even be seen as a special type of IO. Thus, Martini labelled these bodies ‘second-order international organizations’ as a dimension of what she called ‘New International Organization’.⁶⁶ Nevertheless, one could argue that the existence of a separate will is debatable. As we have seen, the autonomy of international agencies is restricted, either because of their strong link with the parent organisation, or because of the dominant role played by member States.

2. The contemporary approach

The fact that trans-governmental regulatory networks are globally active and have significant normative effects on countries, companies, and individuals, but do not have an apparent place in international law has left legal scholars at unease. This has generated contemporary legal approaches to addressing them. International agencies have received less scholarly attention, but the contemporary approaches described below are partly relevant in assessing our approach to other IN-LAW bodies too.

a. NGO’s, ‘twilight existence’ or soft organisations

Not fulfilling the criteria of an IO or of legal personality, some have considered trans-governmental regulatory networks to be NGOs.⁶⁷ Others have argued that they are in a twilight existence, not being formally IOs, but comprised of State agencies.⁶⁸ Along similar lines, Schermers and Blokker have argued that ‘[s]uch [organizations of branches of governments] are on the dividing line between governmental and non-governmental organizations.’⁶⁹ Klabbers said that these entities ‘defy any attempt at definition and classification’⁷⁰ and have simply referred to them as ‘soft organizations’⁷¹.

⁶⁵ See also Slaughter, *A New World Order* 34, 152.

⁶⁶ Martini, *op.cit.*

⁶⁷ As traditionally had been the case regarding the Inter-Parliamentary Union (IPU). Since governments did not take part, the IPU was generally classified as a NGO. See Schermers and Blokker, *International Institutional Law: Unity Within Diversity* 28.

⁶⁸ Ignaz Seidl-Hohenveldern and Gerhard Loibl, *Das Recht der Internationalen Organisationen einschliesslich der Supranationalen Gemeinschaften*, 6 Aufl. ed. (Carl Heymans Verlag, 1996) para. 0103a.

⁶⁹ H.G. Schermers, N.M. Blokker, ‘International Organizations or Institutions, Membership’, in R. Wolfrum (ed.) *The Max Planck Encyclopaedia of Public International Law* (Oxford University Press 2008)2. http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e505&recno=2&author=SchermersHenryG accessed 26 Oct. 2011.

⁷⁰ Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press, Cambridge 2002) 12.

⁷¹ J. Klabbers, ‘Institutional Ambivalence by Design: Soft Organizations in International Law’ (2001) 70 *NJIL* 403, 405.

International agencies somehow escaped academic attention. Nevertheless, it seems to us that their twilight existence, albeit for different reasons, may be comparable to soft organizations in the sense that their status is somewhere between an international organisation and a TRN.

b. Stretching the definition of IO

There have been developments in the literature that have sought to accommodate, on the basis of liberal and broad interpretation methods, certain informal entities within the traditional definition of an IO. For example, in 1999 Brownlie and Goodwin-Gill issued a legal opinion on the international legal status of the Inter-Parliamentary Union (IPU). The IPU is an organisation of parliaments from around the world which is not treaty-based.⁷² They concluded that the IPU enjoys international legal personality and is an international organisation *sui generis*.⁷³ Brownlie and Goodwin-Gill stressed that even if an entity lacks the features of an IO, it may possess international legal personality.⁷⁴

The progressive element of their legal opinion relates to their interpretation of the notion of State membership in IOs. They consider the IPU to be an IO despite the fact that its members are State organs (parliaments) rather than unitary States, since they consider the State to be an 'indirect participant', granting 'implicit consent'.⁷⁵ Moreover, in claiming that IR has undergone transformation and is no longer merely diplomatic, they argue that there is no need for organs of the State to receive explicit or implicit consent by the executive.⁷⁶ Thus, rather than moving away from the requirement of State membership, they simply offer a broad interpretation of the term, considering 'implicit state consent' or 'indirect state participation' as equivalent to State membership. Indeed, for many TRNs that State consent is implicit if not explicit. For example, the Transatlantic Economic Partnership between the US and EU makes the removal of third generation trade barriers, that is, the removal of technical regulatory differences between the US and EU, a priority, and expects this work to be done between regulators. While politicians are not involved in the important aspects and practical details of harmonisation, the regulators report to the political level about their transnational activities and harmonisation efforts, and the latter are, hence, well aware of such activities.⁷⁷

Other scholars have also argued that the notion of membership in IOs goes beyond unitary States only, and that there may be exceptions.⁷⁸ For example, as early as 1971 Morgenstern referred to a controversial UN legal opinion, which argued that 'it may well be that a new customary rule of international law is emerging under which...a legal person could be

⁷² The legal opinion is entitled 'The international legal personality of the Inter-Parliamentary Union (IPU), its status as an international organization in international law, and the legal implications of such status for the IPU's relations with governments and other international organizations' (henceforth, IPU Legal Opinion). <http://www.ipu.org/finance-e/opinion.pdf> accessed 26 Oct. 2011.

⁷³ IPU Legal Opinion, para. 1.

⁷⁴ Ian Brownlie, *Principles of Public International Law*, Sixth edition (Oxford University Press, Oxford 2003) 650.

⁷⁵ IPU Legal Opinion, para. 16.

⁷⁶ *Ibid.*, para. 66.

⁷⁷ See Ayelet Berman, *The Role of Domestic Administrative Law in the Accountability of IN-LAW*.

⁷⁸ H.G. Schermers, N.M. Blokker, 'International Organizations or Institutions, Membership' 1.

created by an agreement concluded solely by autonomous public entities, such an agreement being governed by international law pursuant to another new customary rule...'.⁷⁹

Moreover, the ILC, in the context of its work on the responsibility of IOs, has said that
'...

[s]everal important international organizations have been established by State organs other than governments or by other organs together with governments.... [and that] an increasing number of international organizations include among their members entities other than States as well as States; the term 'intergovernmental organization' might be thought to exclude these organizations, although with regard to international responsibility it is difficult to see why one should reach solutions that differ from those applying to organizations of which only States are members.⁸⁰

It accordingly defined IO as 'an organization established by treaty or other instrument governed by international law and possessing its own legal personality. International organizations may include as members, in addition to states, other entities.'⁸¹ 'Other entities' could, hence, be understood to mean sub-organs of the State (as well as private actors).

Also with regard to the condition that an IO be based on a treaty, most writers acknowledge that there may be exceptions and that there may be alternative modes of creation.⁸² Thus, a treaty base is not a *conditio sine qua non* to be an IO, and the source of the legal personality could equally be the resolution of a conference of States or uniform State practice.⁸³ Moreover, an entity may become an IO 'by way of evolution'⁸⁴, or may be created by conferences.⁸⁵ Interpol, for example, is not founded on a formal treaty and has been identified as an IO, and the same holds true for the OSCE.⁸⁶ In some cases, the decision of an IO constitutes the constitutional basis of a new IO.⁸⁷ Hence, international agencies could be considered as IOs.

⁷⁹ Felice Morgenstern, *Legal Problems of International Organizations* (Grotius, Cambridge 1986).

⁸⁰ *Report of the International Law Commission*, 61st session (4 May-5 June, 6 July-7 Aug., 2009), UN Doc. A/61/10; GAOR, 64th Sess., Supp. No. 10 (2009).

⁸¹ International Law Commission, 'Commentary to Draft Article 2' in *Report of the International Law Commission*, 55th Session (5 May-6 May and 7 July-8 August 2003), GAOR 58th Session Supp 10, 38.

⁸² Schermers and Blokker, *International Institutional Law: Unity Within Diversity*, pp. 25-27.

⁸³ Brownlie, *Principles of Public International Law* 650; N.D. White, *The Law of International Organizations* 4-5, 29.

⁸⁴ Brownlie and Goodwin-Gill 18. Examples of entities that evolved into IOs: 'The Conference on Security and Cooperation in Europe which over years acquired the structure and organs of an international organization and finally became known as the Organization for Security and Cooperation in Europe; the Commonwealth Secretariat did not start as an international organization, but evolved into one.'

⁸⁵ Morgenstern, *Legal Problems of International Organizations* 19, 21-2; Kirsten Schmalenbach, 'International Organizations or Institutions, General Aspects' 3.

⁸⁶ J. Sheptycki, 'The Accountability of Transnational Policing Institutions: The strange case of Interpol' (2004) 19 *Canadian Journal of Law and Society* 107. She cites Paul Reuter that 'because of its function as an international vehicle for crime prevention that relies on cooperation between governments, it is an intergovernmental organization regardless of whether or not it was established without a treaty.' Cf also I.F. Dekker and R.A. Wessel, 'Van CVSE naar OVSE. De sluipende institutionalisering en onvermijdelijke juridisering van een internationale conferentie', *Vrede en Veiligheid*, 2002, no. 4.

⁸⁷ Schmalenbach, 'International Organizations or Institutions, General Aspects' 3.

Essentially doing away with formalistic criteria, in assessing international legal personality Brownlie and Goodwin-Gill stress that the primary test is functionality:

In its decision in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the International Court of Justice, when referring to treaties creating “new subjects of law”, captured the essence of international personality, namely, entities “with a certain autonomy, to which the parties entrust the task of realizing certain common goals”. The “primary test” is functional...⁸⁸

As mentioned above, TRNs are usually not granted autonomy in the formal sense (ie, they do not have authority to conclude legally binding agreements with their counterparts). However, regulators certainly enjoy autonomy from the political level to harmonise regulation. Looked at from this perspective, the functional criteria is fulfilled, and harmonisation TRNs could be considered as being international legal persons, or even IOs.

With regard to international agencies it has been noted that the picture is, at best, mixed. The examples reveal that international agencies continue to be dependent on member States, in so far as their internal architecture has an intergovernmental or multinational nature and they operate through administrative proceedings to which national authorities are called to participate. In functional terms, irrespective of their bureaucratic character, many international agencies can even be seen as mechanisms of administrative cooperation and integration among domestic authorities. This is not to ignore that certain forms of autonomy towards member States are emerging, in particular in cases where scientific expertise plays a large role. But even there the picture is mixed as is for instance illustrated by the CAC. In short, the strong links which exist between an international agency and the parent organisation, on the one hand, and the member States, on the other hand, may put the autonomy of such agencies into perspective.⁸⁹

c. Should IN-LAW bodies be recognized as new subjects of international law?

The most progressive approach has been to call for the recognition of trans-governmental regulatory networks as subjects of international law that would be directly and independently subject to international legal obligations.⁹⁰ Slaughter has been the main proponent of this approach.⁹¹ She argues that the traditional notion of sovereignty, as an attribute borne by an entire State, is inadequate to capture the complexities of today's IR.⁹² Therefore, each of the government units participating in networks should exercise a measure of sovereignty - sovereignty specifically defined and tailored to their functions and capabilities.⁹³ She bases this argument on the conception of a disaggregated world order: if the principal moving parts of that

⁸⁸ IPU Legal Opinion, para. 8.

⁸⁹ More extensively: Chiti and Wessel, *op.cit.*

⁹⁰ *ibid.*, at 188-189.

⁹¹ See also Zaring, 'International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations' 327-328.

⁹² Anne-Marie Slaughter, 'Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks' (2004) 39 *Government and Opposition* 186.

⁹³ *ibid.*, at 186.

order are government agencies, officials and so forth, then they must be able to exercise some independent rights and be subject to some independent, or at least distinct, obligations.⁹⁴

Is Slaughter's proposal a desirable outcome for IN-LAW bodies, or at least the most significant ones? Should IN-LAW bodies possess international rights and duties (albeit partially)?

Generally, the need to include new legal subjects when times are changing has been acknowledged by many. For example, Hersch Lauterpacht has pointed out that 'it is important...to bear in mind that the range of subjects of international law is not rigidly and immutably circumscribed by any definition of the nature of international law but is capable of modification and development in accordance with the will of States and the requirements of international intercourse.'⁹⁵ In the *Reparations* case, the ICJ held that

throughout its history, the development of international law has been influenced by the requirements of international life [and that] the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States. [...] Such new subjects of international law need not necessarily be States or possess the rights and obligations of statehood.⁹⁶

Thus, new legal personalities may be added with changing times. And indeed, international law has seen a proliferation in the number of subjects added during the twentieth century.⁹⁷

In light of the above, the question we international lawyers must pose ourselves is whether the time has come to recognize a new set of subjects? Our tendency is to be cautiously positive towards the recognition of the legal personality of at least some IN-LAW bodies. We will explain this.

The question of legal personality is primarily to be found at two levels. First, whether the body, rather than its component parts, possesses international rights and obligations. Second, when something has gone wrong, and responsibility is sought, whether the body or its component parts can be held responsible. The situation for IN-LAW bodies, under the traditional accounts, is that they are not directly subject to international law, and may not be held directly responsible or accountable for wrongful acts.

In the current state of the world - where so much normative activity with globally far-reaching effects is taking place by IN-LAW bodies - this situation is unjustified. Responsibility and accountability should be a function of power, and not of legal status, as the saying 'with

⁹⁴Slaughter, 'Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks' 188.

⁹⁵Hersch Lauterpacht, 'The Subjects of International Law' in E. Lauterpacht (ed.) *International Law, The Collected Papers of Hersch Lauterpacht, Volume I: The General Works* (Cambridge University Press, Cambridge 1970) para. 48.

⁹⁶ *Reparations* case 174.

⁹⁷For a description of subjects of international law currently accepted, see Walter, 'Subjects of International Law', Section B.

great power comes great responsibility' goes. Sticking to the traditional approaches hence runs the risk of creating injustice.

One possible way to approach this would be to determine that whenever an international body exercises significant international public authority (as defined above), it should be directly subject to the relevant international legal rules as well as be directly responsible for any breaches of international law. Indeed, this would imply a separate legal status for these bodies. Following this approach, IN-LAW bodies that have significant public authority would be directly subject to international law and directly responsible for breaches of international law.

We acknowledge that this approach requires further consideration, and the consequences, advantages, and disadvantages need to be carefully considered. For example, a possible drawback of such independent status may be that it enhances the power of the IN-LAW body and may, in turn, make it more difficult rather than easier to hold the IN-LAW actors accountable. Participating national actors may, for example, hide behind the body when it comes to responsibility; or independent international status may reduce the need for domestic implementation and the domestic control that comes with it.

F. Is international legal personality important for accountability?

1. Discussion

The central question of the IN-LAW project is whether IN-LAW - falling out of the traditional structures of domestic and international law - raises more accountability concerns than traditional, formal, international or domestic bodies.⁹⁸ It is in this context that we pose the following questions: what role does the international legal status of a body have in relation to its accountability? Is international legal personality important for accountability?

In recent years, during their search for solutions for accountability concerns, several groups of legal scholars attributed ever less importance to the doctrine of personhood. Rather, they have been suggesting legal frameworks that apply equally to formal and informal bodies. For example, the Global Administrative Law Project promotes the application of standards of accountability such as transparency and participation to all global administrative bodies, including both formal and informal bodies, such as International Agencies and TRNs.⁹⁹ Similarly, the *Exercise of Public Authority by International Institutions* project, seeks to apply a public law approach to any exercise of international public authority, irrespective of whether it is conducted by formal or informal actors.¹⁰⁰

From this perspective, the question of the international legal status seems to be an outdated question, at least in the context of the discussion on accountability. Indeed, as

⁹⁸ See the introductory chapter by Pauwelyn.

⁹⁹ Standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make. See B. Kingsbury et al., *The Emergence of Global Administrative Law*, 17.

¹⁰⁰ von Bogdandy et al., *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 15.

mentioned above, we too consider that it would be unjustified to focus on the question on this formality in the context of accountability. But the main point we wish to make here is that even if a body possesses legal personality, it is not very meaningful for accountability, at least not from a procedural perspective. The IN-LAW project focused on accountability from a procedural perspective¹⁰¹, and in the absence of a procedural international law on accountability (say, rules on transparency, participation, reason giving for decisions, complaints mechanism, etc.) international legal personality has little to contribute.

The reason is that even if IN-LAW bodies have legal personality, these procedural principles are not to be considered as binding rules under international law, and are thus not applicable to formal and informal institutions alike. There is no procedural international legal rule that obliges subjects to follow good administrative practice in its decision-making. This fact is already reflected in the big variations of participation possibilities and transparency policies in existing formal IOs such as the WHO, WTO, and ILO. The World Bank is one of the few if not the only IO that offers a complaints mechanism open to stakeholders affected by its policies.¹⁰² To the extent it could be established that these principles have become imbedded in international law, the answer would be more complicated but in the meantime that is the case.

A different question is whether international legal personality would matter regarding the application of substantive international law to IN-LAW bodies. Here, the fear raised in the literature that IN-LAW bodies escape substantive international law altogether needs to be nuanced. The reason is that regulatory authorities or other State actors participating in the IN-LAW body may be subject to international law through the rules on State responsibility. According to Article 4 of the Draft Articles on State Responsibility¹⁰³ which reflect customary law¹⁰⁴, acts by State organs (including regulators, agencies, etc.) even when acting independently from the central government¹⁰⁵, can be attributed to the State.¹⁰⁶ It logically

¹⁰¹ See the introductory chapter by Pauwelyn.

¹⁰² See A. Orakhelashvili, 'The World Bank Inspection Panel in Context: Institutional Aspects of the Accountability of International Organizations', *International Organizations Law Review*, 2005, no. 1, pp. 56-102.

¹⁰³ Article 4 entitled *Conduct of Organs of a State* provides that: '1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State. An organ may be a 'person or entity', and it is understood in a broad sense to include any natural or legal person, including an individual office holder, a department, commission or other body exercising public authority.' See J. Crawford, *International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, Cambridge 2002) 98-99. Crawford comments that 'It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and to whatever level in the hierarchy...', at 95.

¹⁰⁴ James Crawford, *International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, Cambridge 2002) 94.

¹⁰⁵ *ibid.*, at 97, 98.

¹⁰⁶ Article 4 entitled *Conduct of Organs of a State* provides that: '1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State. 2. An

follows that whenever State organs collaborate internationally, all of the international legal obligations that apply to the State, apply to their activities, where applicable. Consequently, the State may be held responsible if regulators or any other State organs, in their activities in the bodies, breach international obligations applicable to the State. Article 47 is also relevant, setting out the principle that several States may be responsible for the same internationally wrongful act, for example when they act jointly in respect of an entire operation.¹⁰⁷ Accordingly, all governmental members could be held accountable for say breaches of international human rights law - even in the absence of international legal personality. Similar reasoning would apply in relation to international agencies where either the member States would remain responsible or the parent organisation. In the latter case, the *Draft Articles on the Responsibility of International Organizations* could provide guidance.¹⁰⁸

This situation is very reminiscent of partnership under domestic legal systems. While there are variations among civil and common law countries, and between the specific domestic arrangements, in many countries (such as England) partnerships do not possess separate legal personality. The partners will each be personally liable, jointly or severally, for the partnerships actions/debts. This could similarly be the case in harmonization networks, international agencies or other IN-LAW bodies.

Furthermore, the entire set of international rights and duties that apply to States and IOs may continue to apply in their entirety, as applicable, to the governmental actors participating in the IN-LAW body. For example, it is clear that all international human rights applicable to a State apply to State organs in their IN-LAW activities. As independent entities, this would be debatable. There may, therefore, even be some merits to this approach.

Having said that, the significant practical consequence of accepting the international legal personality of IN-LAW bodies from an accountability perspective would be twofold.

First, as mentioned above, they would independently be subject to substantive international law, say, human rights law. That is important given that many IN-LAW bodies also consist of private actors that currently, even under the partnership scenario described above, escape international law. Second, they would be responsible for illegal acts performed by

organ includes any person or entity which has that status in accordance with the internal law of the State.' An organ may be a 'person or entity', and it is understood in a broad sense to include any natural or legal person, including an individual office holder, a department, commission or other body exercising public authority.' See J. Crawford, *International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, Cambridge 2002) 98-99. Crawford comments that 'It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and to whatever level in the hierarchy...', at 95.

¹⁰⁷ Crawford, *International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* 272, 274. Article 47: 'Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.'

¹⁰⁸ See on the implications of the Draft Articles P. Jan Kuijper, 'Amsterdam Center for International Law: Introduction to the Symposium on Responsibility of International Organizations and of (Member) States Responsibility of International Organizations and of (Member) States', (2010) 7 *International Organizations Law Review* 9.

them - rather than the member States or IOs. This would mean that private bodies collaborating with governments, as is often the case in IN-LAW bodies, would be subject to the same responsibility regime as governments. But as mentioned above, there may be drawbacks such as reduced domestic accountability. Finally, given the fact that complaints mechanisms at the international level are virtually lacking, there would be no mechanism through which one could actually press charges.

2. *Example*

To illustrate the role of international legal personality in the accountability of IN-LAW bodies, let us go through the following real-life example.

The ICH, a network of drug regulatory authorities and industry associations from the US, EU and Japan, issued a guidance on good clinical practices (GCPs). The GCP sets out how clinical trials should be conducted (that is, how drugs in development can be tested on human beings). With globalization, many drug companies conduct their clinical trials in developing countries so as to reduce costs. Since many of these drugs are intended for the US market, the FDA has a regulation on the acceptance of data from clinical trials conducted abroad. This regulation sets out what data the companies need to present to the FDA when applying for its approval and registration.

In 2008 the FDA amended its regulation on the acceptance of data for clinical trials conducted abroad. It amended the requirement that clinical trials conducted outside of the US comply with the Declaration of Helsinki, and instead determined that they need to comply with the ICH GCP.

One of the main concerns with this amendment was that the GCP allows the pharmaceutical industry to run clinical trials in which the patients in the control group can be treated with placebos instead of the existing proven therapy. In contrast, the Declaration of Helsinki, which is considered the perfect embodiment of international ethics standard for conducting clinical trials, requires that extreme care be taken in making use of placebos when there is an existing proven therapy. In other words, the DoH requires that new treatments should be tested against old treatments rather than placebos, whereas the GCP allows for new treatments to be tested against placebos.

The background to the DoH's requirement is ethical: In certain cases it may be unethical to give a placebo when an existing treatment is available. For example, in the past there have been cases where in trials of drugs for the prevention of maternal to child HIV transmission some women were given placebos even though an available treatment existed, and it resulted in children being infected whose disease might have been prevented had they received the existing treatment.¹⁰⁹ On the other hand, administering placebos rather than alternative treatment is cheaper for the drug companies.

¹⁰⁹P. Lurie and SM Wolfe, 'Unethical Trials of Interventions to Reduce Perinatal Transmission of the Human Immunodeficiency Virus in Developing Countries' (1997) 337 *New England Journal of Medicine* 853.

Given the above, would the existence or lack of international legal personality of the ICH make any difference for accountability?

As regards procedural legal claims if we consider, say, a patient organisation that would have liked to participate in the drafting of the GCP, or, for instance, of a patient in Africa who has been administered placebo in a clinical trial – could this patient submit a complaint or seek recourse against the ICH? The answer is in the negative. In the absence of a procedural international law on accountability including elements such as good administrative procedures, and complaints mechanisms, international legal personality remains irrelevant.

As regards substantive claims regarding inconsistency with human rights law (without going into a debate over whether the DoH reflects human rights law or merely ethical standards), lacking legal personality, the ICH as a body is not subject to international human rights law. The governmental members of the ICH are, however, bound by international human rights law. Claims against the US, Japan, and the EU could be brought before the existing international human rights bodies and/or domestic courts where applicable. While the industry could be shamed in light of business and human rights standards, there would not be an international legal claim against it.

On the other hand, if the ICH had legal personality, a direct legal claim against it could be raised. That said, there is no obligation under IL to provide a complaints mechanism, and, hence, it is unclear with which forum such a claim could be raised. So far very few international bodies have set up complaints mechanisms, the World Bank Inspection Panel being a notable exception.

To conclude, legal personality would allow for substantive claims to be raised directly towards the ICH. While that may lead to pressure, these claims cannot be enforced. Moreover, in the absence of a procedural international law on good administrative practices, legal personality is not a significant factor. Were an international rule on procedural accountability to exist, international legal personality would have more significance.

G. Conclusion

The present contribution purported to describe the status of IN-LAW bodies under public international law, including a particular focus on harmonisation networks and international agencies. It also sought to understand the consequence of the international legal status for questions of accountability.

Our analysis confirms that even when international cooperation is informal (at the process, actor, or output level), this does not prevent a certain or even considerable degree of institutionalisation. Despite such formalism, under most traditional accounts harmonisation networks and international agencies are not IOs or international legal persons although they could be considered as such under more liberal or contemporary approaches. At the same time it also becomes clear that IN-LAW takes place in fora of different forms and shapes which makes

it difficult to draw general conclusions with regard to their international legal status and the applicability of (general) international law.

As this Chapter has demonstrated, in the current state of international law, that is, in the absence of a procedural international law on accountability, legal personality is largely meaningless in relation to accountability questions. This is already well-reflected in the fact that we see wide variations in the extent to which stakeholders participate in the decision-making processes of formal IOs as, for instance, the WTO, WHO, ITU, World Bank or ILO, or in the extent to which the latter have complaint mechanisms at their disposal (for example, only the World Bank has an Inspection Panel where claims by stakeholders against policies can be raised). Organisations that do have them, largely do so as a matter of practice or due to bottom-up application of domestic practices/laws, rather than as a matter of international legal obligation.

With respect to substantive international law, even in the absence of legal personality, the IN-LAW body's membership being composed of States and/or IOs, each governmental member is bound by international law, albeit indirectly through States and/or international organisations. IN-LAW bodies, hence, cannot escape substantive international law altogether.

That being said, there are advantages of having legal personality. IN-LAW bodies would directly be subject to substantive international law (albeit partly), and as such, claims regarding breaches of international law could be brought to them by a direct process. While - given for instance the relative independence of some of the bodies - there may be justifications as well as advantages to such an approach, and it may have several drawbacks. In the future we should further contemplate the consequences, advantages, and disadvantages of bestowing (at least some) IN-LAW bodies with legal personality.